



## Michigan Bankers Association

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October 6, 2009

Michigan Supreme Court  
Hall of Justice  
925 West Ottawa Street  
P.O. Box 30052  
Lansing, MI 48909

Attn: Anne M. Boomer

Subject: Proposed Supreme Court Rule 1.15A

Dear Ms. Boomer:

The Michigan Bankers Association, the voice of Michigan banking since 1887, represents 170 banks in Michigan. We have been asked to provide remarks regarding proposed Supreme Court Rule 1.15A. The proposed Rule deals with a new special notification by banks to the Attorney Grievance Commission when a lawyer trust account, including an IOLTA account, is overdrawn.

For several years, Michigan Bankers Association staff has worked cooperatively with staff from the State Bar of Michigan and the State Bar Foundation to discuss the matter of lawyer trust accounts, including IOLTA accounts. We appreciate the openness and willingness of State Bar staff to listen to our concerns and we appreciate that several of our concerns, such as those related to bank compliance with federal privacy laws, have already been addressed in the proposed new Rule 1.15A.

Recently, several other concerns with the proposed Rule have been brought to our attention, however.

First, it's important to understand that to offer a special account, such as an IOLTA account, or a non-IOLTA trust account, a bank must incur costs, costs that are not reimbursed. These costs include expenses associated with computer programming and testing, new forms, and assorted account maintenance expenses. To date, banks that offer IOLTA accounts have absorbed these costs.

While some banks may have in-house IT staff to write and test software programs, others purchase pre-packaged software programs or contract with vendors to write special software programs. In any regard, it all costs money and the costs, to date, have been borne by the banks, not by the Supreme Court, not by the State Bar of Michigan, not by the State Bar Foundation, not by the Attorney Grievance Commission, and not by lawyers. The financial burden has been placed upon the organization that has "no skin in

the game” – the banks. This situation is all askew. It is not the job of banks to pay for the policing of the activities of lawyers.

The proposed Rule 1.15A, which would require a new special account product for non-IOLTA trust accounts, would have as a consequence banks incurring substantial additional costs, costs for computer programming and testing, along with costs associated with new forms and account maintenance expenses. Frankly, while we have no empirical data on the matter, we believe there are relatively few of these accounts outstanding in Michigan.

This raises the obvious question: Who is going to pay for this additional expense? We do not believe it is the responsibility of banks to incur this additional financial burden.

It is also important to understand that it is not a simple matter for a bank to provide a copy of an overdraft notice to a third party. It is not a matter of merely flipping a switch or adding another name and address to some file.

In many banks, existing computer software programs do not allow a second notice to be issued. Further, a second notice is not even possible when an account holder designates that all communications are to be made electronically. In these situations, to comply with federal privacy requirements, electronic notices to customers do not state that the account has been overdrawn. Rather, the electronic notice advises the customer to check his or her electronic account statement for those messages. The overdraft notice is posted on the customers privacy protected electronic account summary, not in an e-mail.

Proposed Rule 1.15A should include a provision for banks to be reimbursed for their actual costs to implement the Rule, including costs associated with the design and development of IT systems, forms and procedures.

The proposed new Rule 1.15A poses other concerns, as well.

Section (e) of the proposed Rule appears to specifically prohibit banks from charging costs against either the principal, or interest or dividends earned on trust accounts, including IOLTA accounts. We are concerned that such a mandate in a Court Rule might be construed as an effort to regulate the business of banking in violation of Article IV, section 43 of the Michigan Constitution which reads:

No general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof, shall be enacted, amended or repealed except by a vote of two-thirds of the members elected to and serving in each house.

Similarly, we are concerned that section (d) of the proposed Rule, which appears to mandate banks to submit certain information in an “overdraft report” to the Attorney Grievance Commission, could also be construed to be in violation of Article IV, section 43 of the Michigan Constitution.

While this constitutional provision would likely only apply, if at all, to Michigan state-chartered banks, sections (d) and (e) might be subject to preemption by the National Bank Act, as it would otherwise apply to national banks, and by the Home Owners Loan Act, as it would otherwise apply to federal thrift institutions. A plethora of decisions of the U.S. Supreme Court, which I

won't cite here, have upheld numerous preemption attempts by states to regulate the business of national banks and federal thrifts.

To address these constitutional and preemption concerns, we have recommended to State Bar Foundation staff that the proposed Rule focus on requirements for lawyers rather than requirements for banks. Rewording of these sections could easily avoid any potential state constitutional or federal preemption issue.

Regarding non-IOLTA trust accounts, banks that chose to offer such a product would be required to develop an account product different from its traditional deposit accounts – a product that would accommodate for the Court's Rule, another expense for the banks.

Notwithstanding any requirements or procedures the State Bar might develop to implement the proposed Rule, we believe it is important that Rule itself specifically and clearly state that a lawyer must advise the bank in writing as to which accounts are non-IOLTA trust accounts and further the lawyer must do so in accordance with common procedures developed by the State Bar.

Further, we believe the Rule itself must clearly and specifically state that the Rule will not take effect until at least 6 months following the development and distribution of procedures and forms by the State Bar to both lawyers and to banks.

Finally, we note upon review of statutory provisions in the Ohio Code and Rules of the Ohio Supreme Court that the requirements placed on Ohio lawyers only address IOLTA accounts and do not address non-IOLTA trust accounts. We believe this to be the case in several other Midwest states, as well.

If the Court seeks to adopt a Rule dealing with notification of overdraft accounts to the Attorney Grievance Commission, we strongly recommend it be limited to IOLTA accounts at this time. We believe issues dealing with non-IOLTA trust accounts warrant significant further review and discussions with State Bar and State Bar Foundation staff.

As always, we remain ready and available to assist the Court, the State Bar and the State Bar Foundation to fine-tune the language of proposed Rule 1.15A for subsequent consideration.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "R. D. Lavolette", with a stylized flourish at the end.

Richard D. Lavolette  
General Counsel

cc: Janet K. Welch, Executive Director, State Bar of Michigan  
Linda K. Rexer, Executive Director, State Bar Foundation